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ADMITTED IN VA AND DC

OUR FILE NO.
0342-101-63

December 11, 1998

Magalie R. Salas, Secretary
Federal Communications Commission
1919 M Street, NW
Washington, DC 20554

Re: Comments of Corporation For General Trade
CS Docket No. 98-201

Dear Ms. Salas:

Enclosed herewith, on behalf of Corporation For General Trade, are an original and nine (9) copies of its **COMMENTS** in the above-referenced proceeding. Sufficient copies are provided for each of the Commissioners.

Should there be any questions concerning this matter, please communicate with the undersigned.

Very truly yours,

James E. Dunstan

JED/jmm

Enclosure

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Satellite Delivery of Network Signals	)	CS Docket No. 98-201
to Unserved Households for	)	RM No. 9335
Purposes of the Satellite Home	)	RM No. 9345
Viewer Act	)	
	)	
Part 73 Definition and Measurement	)	
of Signals of Grade B Intensity	)	

To: The Commission

COMMENTS OF CORPORATION FOR GENERAL TRADE

Respectfully submitted,

CORPORATION FOR GENERAL TRADE

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its Attorney

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December 11, 1998

Summary

In granting the Direct To Home ("DTH") industry a limited compulsory license in the 1988 Satellite Home Viewer Act ("SHVA"), Congress stated that DTH provides could only provide distant network programming to "unserved areas." Congress defined such areas as those outside the Grade B signal of local stations, and concluded that:

1) Total "unserved areas" would constitute only a "small percentage of television households";
2) A "high percentage of all U.S. households" would be defined as "served" and thus not available for DTH to sell distant signals into; and
3) The typical "unserved" household would be characterized as "rural."

Congress knew what it was doing, and concluded that using the Commission's then-current definition of Grade B service would result in a definition of "unserved areas" which met all of the criteria above.

NRTC and EchoStar, on behalf of the DTV industry have refused to abide by the statute, and after having been found in violation of the SHVA by several courts, now wish to redefine the term "unserved" in such a way as to allow them to continue to sell distant network programming to their subscribers everywhere. At the same time, the DTH industry has launched a scorched Earth campaign by encouraging all subscribers to seek waivers from local television stations, regardless of whether they can actually receive the local signal. The burden on stations has been huge, as documented herein.

Although the FCC may have some flexibility in defining what "Grade B" means, it cannot accept either the NRTC or EchoStar proposals, since both would result in "unserved areas" inconsistent with the three Congressional criteria listed above, and such standard would be stricter than the Grade A contour standard Congress could have adopted in 1988 but rejected.

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To: The Commission

COMMENTS OF CORPORATION FOR GENERAL TRADE

Corporation for General Trade, Inc. ("CGT"), by its attorneys, hereby files these comments in response to the Commission's *Notice of Proposed Rule Making ("NPRM")* in the above-referenced proceeding. In support of its Comments, CGT submits:

I. INTRODUCTION

CGT is the licensee of WKJG, Channel 33, Fort Wayne, Indiana, which signed on the air November 21, 1953. CGT is a long-time broadcaster striving to bring the best possible service to its viewers. CGT feels compelled to participate in a proceeding which has the potential to fundamentally alter the nature of free over-the-air broadcasting. What the Commission faces in this proceeding is nothing less than a direct challenge by the Direct To Home ("DTH") industry to the carefully crafted

interplay between copyright law and communications policy which has allowed stations to receive the benefit of their contractual bargains, while still allowing alternative media delivery systems to flourish. A misstep in this proceeding will cast aside decades of sound policy in favor of rescuing a law breaker from its own deeds in the misguided name of "competition."

II. UNDERSTANDING WHAT *REALLY* IS GOING ON HERE

Before the Commission assesses the somewhat esoteric issues of statutory construction, Congressional intent, and technical definitional issues, it must understand the core of what is going on in this proceeding. It can be stated very simply:

> **Having been caught with its hand in the cookie jar, the DTH industry wants the Commission to redefine the term "cookie" to absolve its conduct.**

That is what's really going on here. The DTH industry willfully, knowingly, and repeatedly violated the law, and now wishes to be excused from its conduct. [1] The Commission acknowledges this in the *NPRM*. "[M]any, if not most, of those subscribers [set to be cut off pursuant to the Miami court order] do not live in 'unserved households'

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[1] *See CBS, Inc. et al. v. PrimeTime 24 Joint Venture*, Order Affirming in Part and Reversing in Part Magistrate Judge Johnson's Report and Recommendations, 9 F.Supp.2d 1333 (S.D. FL., May 13, 1998) ("*CBS v. PrimeTime 24*, Order"); *CBS, Inc. et al. v. PrimeTime 24 Joint Venture*, Supplemental Order Granting Plaintiffs' Motion for Preliminary Injunction (S.D. FL., July 10, 1998) (No. 96-3650-CIV) ("*CBS v. PrimeTime 24*, Supplemental Order"). *See also ABC, Inc. v. PrimeTime 24, Joint Venture*, F.Supp.2d ____, 1998 WL 544286 (M.D. N.C., July 16, 1998) (Case No. Civ. A. 1:97CV00090) ("*ABC v. PrimeTime 24*, Court Opinion").

under any interpretation of that term." *NPRM*, par. 15.[2] The comments in this proceeding by CGT and others will underscore the fact that the DTH industry has not even ***tried*** to comply with the law. Instead it has pursued the course of "a million wrongs makes a right" – signing up so many subscribers in violation of the law that Congress, or the FCC, would be strong-armed into changing long-standing law and national policy. The Commission has no obligation to save the DTH industry from its own calculated misconduct, no matter how many "competition" buzzwords are spouted.

Moreover, as discussed more fully below, the standards proposed by NRTC and EchoStar industry make clear their intent. They are not interested in providing network signals to "white areas" – those areas which cannot be served by local stations – as the SHVA requires. NRTC and EchoStar want it all. They want to be able to provide distant network programming to all of their current subscribers, and to market their services to all areas of the country, even the cities of license of local television stations. In a strange bit of legislative interpretation, NRTC and EchoStar want the FCC to redefined "white areas" to equal "all areas" by redefining the term "Grade B" to equal a signal level stronger than Grade A, City Grade, or any signal level ever required of a television station.

Although playing semantic games with the English language appears to have become the national past-time, the Commission should reject the DTH's current game because it has not based in legislative history, violates many decades of combined copyright/communications policy, and, in short, is just plain wrong.

III. EXPERIENCE OF WKJG IN DEALING WITH WAIVER REQUESTS UNDER THE SHVA

The SHVA has been in effect for ten years. During the early years of the SHVA, WKJG would receive occasional requests for waivers. In instances where the DTH subscriber lived outside the Grade B contour of the station, a waiver was invariably granted. The Act seemed to be working well.

A few years ago, the landscape changed. Once the networks became aware that the DTH industry had decided to ignore the law, they brought several lawsuits beginning in 1996. The DTH response was to launch a "scorched Earth" campaign to have all existing subscribers request waivers, *regardless of where they lived or whether they could actually receive a local signal.* "Bury them with waivers" apparently was the battle cry, in hopes that stations would be so overwhelmed that they would give in and grant everyone a waiver.

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[2] According to NAB, the various court decisions addressing this issue have found that some 72 percent of all subscribers currently receiving distant network programming illegally are located within the Grade *A* contour of the local stations.

A. WKJG's Staff Has Been Burdened By Waiver Requests

The result of this new tactic was to place a staggering burden on station staff personnel at WKJG. In 1997 the station denied 3269 waiver requests from subscribers located with WKJG's Grade ***A*** contour, and 2970 such requests in the first six months of 1998. This is a back-breaking burden on a single station owner in a below-100 market.

Moreover, when subscribers call up WKJG, they indicated that DTH operators in the Ft. Wayne market are telling them that if they (the subscriber) subjectively feel that the local signal is not good enough, they are entitled to a waiver from the local station. Thus, the burden is instantly transferred to WKJG. Many people call up and argue that there is no way that WKJG can know what they consider to be an acceptable signal.

This course of action ultimately costs WKJG a tremendous amount of money. The only way that the station can convince the subscriber (who, after all is a valued viewer of the station), that a waiver shouldn't be granted, is to go out and do the testing, at no charge to the subscriber. Thus, the DTH provider is avoiding the "loser pays" requirements of the Act, because it dumps the responsibility on the subscriber in such a way as to mislead them into thinking that their subjective viewing criteria is the basis of the waiver. The DTH provider can merely shrug its shoulders and make the station into the bad guy.

The *NPRM*, par. 41, seeks comment on whether the "loser pays" provisions of the statute are working. In CGT's experience, the answer is "no." As recited above, DTH providers in the Ft. Wayne market have managed to game the system such that the only way WKJG can keep from losing a viewer is to absorb the cost of demonstrating to the viewer why WKJG's signal is indeed available. Grant a waiver, and the viewer is lost to distant networks. Deny the waiver with doing the testing, and the viewer vows to never watch the station again.

B. Most Waiver Requests Are Improper

It is not like these waiver requests are being made by those living in outlying areas. In fact, the Ft. Wayne, Indiana, DMA is one of the few markets where the DMA approximates the actual coverage contours of the stations serving the market – there are not vast expanses of land within the DMA which are outside WKJG's Grade B contour.[3] Thus, if the SHVA were working properly, WKJG should not be receiving huge numbers waiver requests. It is only because of the way the DTH industry has chosen to try to pit WKJG's viewers against the station that these burdens arise.

Indeed, a properly formulated waiver request (i.e., from someone at the fringe of a station's signal), is more the exception than the norm. As stated above, in the 18 month period between January, 1997, and June

[3] Attached hereto as Appendix A is a map showing the coverage contour of WKJG along with an outline of its DMA. Probably in no other market in the country is there such a close parallel between the DMA geographic boundaries and the coverage contour of the stations serving that market.

1998, some 6000 waiver requests were received from subscribers living within the Grade A contour of the station. Far fewer requests came from areas outside the Grade A contour.

Was this ***really*** what Congress intended when it granted the DTH industry a limited exemption from full copyright liability in the SHVA? Instead, the Commission can only glean from the examples above that it is the aim and intent of the DTH industry to sell its service, including imported network signals, to every person in the United States, whether they can receive their local affiliates or not.

IV. THE MAJOR PROBLEM IS THAT THE DTH INDUSTRY HAS CHOSEN TO FIGHT BROADCASTERS INSTEAD OF WORKING WITH THEM

When the DTH industry began a decade or so ago, there was great hope that it would and could compete effectively with cable. CGT had such high hopes, and looked forward to working with DTH providers. It seemed a natural to the entrenched cable monopolies. DTH could provide clear cable-like programming via satellite, and subscribers would receive their network programming from their local affiliates via a rooftop antenna, which would be provided as part of the DTH installation.

Unfortunately, something happened along the way to derail this natural competitive alternative to cable. Rather than work with broadcasters, the DTH industry has instead decided to violate the law and infringe broadcasters' copyrights. Apparently, the DTH industry concluded that the cheap way of delivering network programming was to

do it via satellite rather than working with local affiliates. Or, more probably, the DTH industry saw an additional revenue stream it could tap – that of selling network programming, except for the small problem that doing so ***was and is illegal.***

The DTH industry's response has been to ignore the law and then scream about how it is being competitively disadvantaged. The DTH industry has even managed convince some members of Congress at a visceral level that somehow it is the aggrieved party in all this.[4] Yet even if DTH providers were to succeed in this proceeding in being allowed to sell distant network programming, the DTH industry is still doomed to failure, because it refuses to provide what subscribers really want, and that is local network programming. The far smarter course of action would have been, and remains, to work with local broadcasters to offer DTH subscribers a package of satellite-delivered programming and a quality antenna to receive local programming.

Interestingly enough, Lawrence Chapman, Executive Vice President of Direct TV has acknowledged this, and knows that in the future some truce must be reached with local broadcasters. In a video conference on December 9, 1998, presented by KCTS and Convergency Services, Inc., he stated:

> It is no secret that satellite does have a hurdle in terms of its competition with respect to local channels. We look at

[4] *See* Letter from Senator McCain and Representative Bliley to Chairman Kennard of July 8, 1998 (the Miami court's injunction "threatens to undermine the progress the Congress has made in promoting competition.")

> digital terrestrial as the ultimate solution for that. We are actively working with manufacturers to create combination set top devices and televisions that would incorporate Direct TV as well as digital terrestrial capability. We think these set tops provide an optimum local channel solution for the viewer.

So there you have it. At least one of the major DTH players knows that the solution is not to try and sell distant network programming, yet the industry as a whole continues to wage war with broadcasters, not out in the "hinterlands", but downtown, in the heart of a station's local market. Neither the Commission nor Congress should pay heed to the DTH industry's competitive arguments. The DTH players know that there is a legal solution which creates a formidable competitive adversary to cable, it just can make more money if it continues its illegal activities.

V. THE COMMISSION MUST WEIGH THE IMPACT THE DTH INDUSTRY'S PROPOSALS WOULD HAVE ON THE CRITICAL ISSUE OF LOCALISM

While the DHT industry screams mightily about its need to be able to deliver distant network signals in order to compete with cable, as referenced above, it ignores the critical impact its proposals would have on localism and the viability of free over-the-air television.

A. Localism Provides the Constitutional Basis For Cable Must Carry

It is the substantial governmental interest in protecting free over-the-air television which led Congress in 1992 to pass statutory must carry rules. It was this same substantial government interest which was

upheld by the Supreme Court in the *Turner* decision.[5] The *Turner* Court found that Congress had established a government interest in preserving local over-the-air television, and that lack of cable carriage threatened this interest.[6] "We hold that Congress could conclude from the substantial body of evidence before it that 'absent legislative action, the free local off-air broadcast system is endangered.'"[7]

B. Localism Also Provides the Basis For The Commission's Exclusivity Rules

The ability of television stations to acquire the exclusive rights to programming, and enforce those rights against the importation of distant signals by cable systems, also are based on the concept of localism. The FCC has had exclusivity rules on the books since the mid-1970s. *Amendment of Part 73 of the Commission's Rules with Respect to Availability of Television Programs Produced by Non-Network Suppliers to Commercial Television Stations and CATV Systems*, 42 FCC 2d 175, 183 (1973)("*First Report and Order*"); *Amendment of Part 73 of the Commission's Rules with Respect to Availability of Television Programs Produced by Non-Network Suppliers to Commercial Television Stations and CATV Systems*, 46 FCC 2d 892, 899 (1974)("*Reconsideration Order*").

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[5] *Turner Broadcasting System v. FCC*, 137 L.Ed. 2d 369, 391 (1997) ("Broadcast television is an important source of information to many Americans. Though it is but one of many means for communications, by tradition and use for decades now it has been an essential part of the national discourse on subjects across the whole broad spectrum of speech, thought, and expression").

[6] *Id.* at 400.

[7] *Id., citing* 1992 Senate Report, at 42.

In reinstating the Syndex rules in 1988, the Commission reiterated the critical role exclusivity plays in local broadcast television. "Virtually every commentator supporting exclusivity attests to the critical importance of exclusivity as a competitive strategy or tool that should be available. Broadcasters, cablecasters and other delivery media must be able to differentiate their product from that of others to attract and maintain an audience." *Program Exclusivity in the Cable and Broadcast Industries*, 64 RR 2d 1818, 1835 (1988); *Program Exclusivity In The Cable and Broadcast Industries*, 4 FCC Rcd 2711 ("*Reconsideration Order*") (1989). The cable industry challenged these rules before the D.C. Circuit, which rejected their claims, concluding that the rules protected vital interests of local over-the-air television. *United Video, Inc. v. FCC*, 890 F.2d 1173 (D.C. Cir. 1989).

C. Congress Meant To Protect Localism In The 1976 Copyright Act and the SHVA

In adopting the 1976 Copyright Act, which granted cable systems the ability to carry broadcast signals under a limited compulsory license, Congress fully understood that the FCC had in place rules which precluded cable systems from importing distant signals to compete with local signals, in addition to a must carry regime, all designed to protect free over-the-air broadcasting. *See United Video*, 890 F.2d at 1187-1190.

When Congress undertook to grant a similar type of limited compulsory license scheme to the fledgling DTH industry, it too

recognized the importance of protecting local television stations from imported distant signals. That is why it adopted the "white area" provisions of the SHVA, and adopted a very narrow definition of "unserved area."

> This television network-affiliate distribution system involves a unique combination of national and local elements, which has evolved over a period of decades. The network provides the advantages of program acquisition or production and the sale of advertising on a national scale, as well as the special advantages flowing from the fact that its service covers a wide range of programs throughout the broadcast day, which can be scheduled so as to maximize the attractiveness of the overall product. But while the network is typically the largest single supplier of nationally produced programming for its affiliates, the affiliate also decides which network programs of special interest to its local audience, and creates an overall program schedule containing network, local and syndicated programming.
>
> The Committee believes that historically and currently the network-affiliate partnership serves the broad public interest. It combines the efficiencies of national production, distribution and selling with a significant decentralization of control over the ultimate service to the public. It provides a highly effective means whereby the special strengths of national and local program service support each other. This method of reconciling the values served by both centralization and decentralization in television broadcast service has served the country well.
>
> The Committee intends by this provision to satisfy both aspects of the public interest – bringing network programming to unserved areas while preserving the exclusivity that is an integral part of today's network-affiliate relationship.

Id. at 5648-49. To do this, Congress determined that the best compromise was to look to the FCC's Grade B contour to define whether an area was served or not.

D. Localism Equals Public Safety

Apart from these statutory and policy arguments, there is a very practical reason why the FCC must act to protect localism in this case. It has as much to do with protecting viewers from danger as it does with protecting the economic base of television stations to enable them to provide local programming and news. As the above make clear, many SHVA waivers come from subscribers who either refuse to take the basic steps to receive a local signal, or have a misunderstanding of the necessary steps to receive WKJG's local signal.

In each of these cases grant of a waiver would have the very real effect of ***precluding*** these subscribers from receiving the local signal. Beyond the fact that that household is lost to the local station's advertisers, ***it is also lost to local news and emergency programming***. CGT takes its public service obligations very seriously, and is greatly concerned that there are households in the core of its market that would have no idea if a local emergency were at hand. Every waiver means that that viewer won't have the chance to receive such vital information which could save their lives. Especially when some of those waivers come from within a station's ***city of license***, CGT cannot in good conscience say that a waiver is in the public interest. Apparently, however, the DTH industry has concluded that its bottom-line profits are more important than the health and safety of its subscribers, when it encourages subscribers to seek waivers when the DTH company ***knows***

that the local signals can be received with very little effort on the part of the subscriber.

VI. THE COMMISSION SHOULD NOT TAMPER WITH THE DEFINITION OF "UNSERVED AREAS" IN THE SATELLITE HOME VIEWER ACT

The main issue upon which the Commission seeks comment in this proceeding is whether it should provide some different interpretation to the "unserved area" provisions contained in the SHVA. *NPRM*, par. 1. CGT submits that the Commission should not so intervene.

A. Congress Said Grade B and it Meant Grade B

The statute is abundantly clear. DTH companies can only provide distant network services to subscribers living in "unserved households," defined as those which:

> "(A) cannot receive, through the use of a conventional outdoor rooftop receiving antenna, an over-the-air signal of grade B intensity (as defined by the Federal Communications Commission) of a primary network station affiliated with that network . . .[8]

The DTH industry would have the Commission believe that somehow Congress was confused or otherwise uninformed as to what "Grade B" meant, or that Congress intended that "Grade B" mean something other than what both FCC regulations and industry standards meant by that term. A review of the of the legislative history of the 1988 SHVA demonstrates that this simply is not the case. The legislative history point ***directly*** to Section 73.683(a), which provides a clear

definition of Grade B in engineering terms. H.R. Rep. No. 100-187(I), at 26, *reprinted in* 1988 U.S.C.C.A.N. 5629 (1988). Most devastating to the DHT industry's claims that Congress really intended a more strict standard is the fact that Section 73.683(a) also defines such a stricter standard, the Grade A contour, between 10 and 21 dBu higher than the Grade B standard, depending on channel number. The Commission simply cannot look at the legislative history and conclude that Congress never read the rule, or somehow meant to adopt a more stringent standard than Grade B when it passed the SHVA.

B. Congress Intended To Allow Distant Network Service To Very Few Areas

The statute and legislative history of SHVA are internally consistent ***only*** if one concludes that Congress knew what it was doing when it pointed to the Grade B standard contained in Section 73.683(a). After all, Congress' intent was to allow the importation of distant signals only into "unserved areas" – areas into which the local stations did not reach. Elsewhere in the legislative history Congress concluded that "a high percentage of all U.S. households" are served over-the-air,[9] that "unserved areas" are "typically rural",[10] and constitute only a "small percentage of television households."[11] A Grade B contour consistent with current FCC interpretation is the only one which results in

[8] 17 U.S.C. Sec. 119(d)(10).
[9] H.R. Rep. No. 100-187(I), at 19-20, *reprinted in* 1988 U.S.C.C.A.N. 5622-23 (1988).
[10] *Id.* at 5648

"unserved areas" which meet the parameters Congress elicited in the SHVA legislative history.

C. The FCC Has Consistently Used The Grade B Contour To Define The Service Areas Of Its Licensees

Congress had much more than just a naked Section 73.683(a) to point to in concluding that "unserved areas" should be strictly limited to those areas outside a local station's Grade B contour. The Commission has long-stated that the Grade B contour of a station is the area which it is reasonably expected to serve. *Amendment of Section 76.51 (Orlando-Daytona Beach- Melbourne-Cocoa, Florida),* 102 FCC 2d 1062, 1070 (1986) ("[w]e believe that television stations actually do or logically can rely on the area within their Grade B contour for economic support").

The original 1966 must carry rules required cable systems to carry signals within their Grade B contours, and the 1972 rules retained these requirements for UHF stations, because viewers within a station's Grade B contours were expected to be able to receive a signal from such "local" stations. *Cable Television Report and Order,* 36 FCC 2d 143, 148, 174 (1972). Congress had all of this, and more, before it when it adopted its definition of "unserved areas" in Section 119 of the Copyright Act.

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[11] *Id.* at 5621.

D. The Grade B Contour Standard Is Most Consistent With The Cable Compulsory License Also Found In Section 111 of the Copyright Act

Finally, The Commission must also not overlook the fact that Congress, in enacting a limited exception to full copyright liability for DTH, looked to its other compulsory license, the cable compulsory license, to define terms such as "local" and "unserved." The cable compulsory license also looks to the Grade B contour of stations to determine whether a signal is "local" for copyright purposes. *See* 37 C.F.R. Sec. 201.17 (copyright regulations which discuss the impact of a station's Grade B contour on its "local" status for copyright purposes."

E. The DTH Proposals Are Inconsistent With The Statute

Set against a clear consistent coupling of legislative intent and agency interpretation to the traditional definition of Grade B contour, come the proposals of the National Rural Telecommunications Cooperative ("NRTC") and EchoStar Communications Corporation ("EchoStar"), in an attempt to redefine the term Grade B more to their liking. NRTC advocates a redefinition of Grade B to be the area in which 100 percent of the people receive the requisite signal level[12] 100 percent of the time. *NPRM*, par. 9. The EchoStar proposal is that Grade B should be defined as the area in which 99 percent of the people receive a

[12] E.g., 47 dBu for Channels 2-6, 56 dBu for Channels 7-13, and 64 dBu for Channels 14-69. *See* 47 C.F.R. Sec. 73.683(a).

Grade B signal level 99 percent of the time, with a 99 percent confidence level. *Id.*

The Commission need ask only one set of questions in regard to these proposals -- would these standards result in :

1) Total "unserved areas" which constitute only a "small percentage of television households"; [13]
2) A "high percentage of all U.S. households" remaining defined as "served" and thus not available for DTH to sell distant signals into; [14] and
3) The typical "unserved" household being characterized as "rural"? [15]

If the answer to any of these questions is false, then such a standard patently is inconsistent with the legislative history of the SHVA, in which Congress made clear its intent to carve out as "unserved" a very limited number of households.

It hardly takes an engineer to conclude that both the NRTC and EchoStar proposals can't meet this test. First, NRTC's 100/100 standard would be virtually impossible for any station to meet, even a mile from its transmitter. Theoretically, a single sparrow landing on the receive antenna can disrupt the signal of a station for a millisecond or two. Under NRTC's perfection standard, virtually no subscribers would be

[13] *Id.* at 5621.
[14] H.R. Rep. No. 100-187(I), at 19-20, *reprinted in* 1988 U.S.C.C.A.N. 5622-23 (1988).
[15] *Id.* at 5648

deemed as "served." EchoStar's 99/99/99 standard is virtually the same. A rainstorm or two in a month with gusting winds again would render the vast majority of households in the category of "unserved." Since it is clear that these standards cannot result in the statutory intent of a very limited number of households being defined as "unserved," they must be rejected as the "swing for the fences" ploys that they are.

CGT can only query as to whether NRTC and EchoStar would be willing to live by their own standards. In other words, are willing to stated that if they are unable to deliver a high quality signal 99 percent of the time during a month to their subscribers, that they would deem them to be "unserved" and not charge them for that month's service? Somehow CGT doubts that either group would find such a standard palatable for themselves. Yet that is the standard they want local television stations to meet.

CGT must also point out that both of these standards are much stricter than the Grade A standard. Yet Congress had at its disposal the choice of the Grade A standard when it defined "unserved" in the SHVA. It was aware of the Grade A standard when it pointed directly to the rule section containing the definitions of Grade A and Grade B signals. At the very instant that NRTC and EchoStar propose a standard more stringent than one which Congress rejected, their proposals cannot be squared with the statute. Indeed, any redefinition of "unserved" which results in a standard more stringent that the Grade A standard rejected by

Congress in 1988 must be held to be inconsistent with the statute. It is beyond the Commission's interpretative powers to adopt any standard which results in a station's "served" area being smaller than its Grade A contour.

F. Conclusion: Grade B Means Grade B

The Commission can safely conclude that Congress was not confused, it did not stumble, or it was ambiguous when it adopted the Grade B standard for defining "unserved areas." Rather, the ***only*** way to consistently interpret the statute with the legislative history is to conclude that the Grade B contour we've known for years was meant to define the very limited number of households into which DTH could import distant signals to the detriment of local stations. The Commission's inquiry should end here.

VII. RELIEF AVAILABLE TO THE DTH INDUSTRY

Although the DTH industry certainly does not deserve any relief, based on its willful, callous disregard for the law, CGT can accept some minor modifications to the way in which the traditional Grade B standard is applied which would remove some of the doubt as to whether a particular subscriber was served, as well as make measurement taking easier and less costly.

A. The Commission May Apply The Longley-Rice Methodology to Calculating Grade B Contours For SHVA Purposes

At paragraph 30 of the *NPRM*, the Commission suggests that the use of the Longley-Rice methodology might be a better way of predicting whether individual households are "unserved" without have to resort to individual tests. CGT supports this proposal. The benefit of the Longley-Rice methodology is that it takes into account topography, and would catch most cases in which a subscriber, although within the Grade B contour if a flat terrain is assumed, nonetheless lives behind a legitimate obstruction which blocks proper reception. As the Commission points out, Longley-Rice has been adopted in the DTV proceeding with some degree of success. *NPRM*, par. 34. Longley-Rice also has been used as the basis for the industry "red light/green light" compromise which, but for NRTC's and EchoStar's desire to "have it all" appears to be working well in diffusing some of the distress of subscribers who were lulled into believing that they could take distant signals. *Id.*[16]

B. Individual Testing Methods May Be Simplified

The Commission points out that "individual testing is the key safety net mechanism under the SHVA for proving that a specific household is unserved and thus eligible under the law to receive satellite delivery of network affiliated television stations." *NPRM*, par. 37. The

[16] Again, however, it must be reiterated that if it appears that use of the DTV Longley-Rice methodology will result in a dynamic change in the number of households which would be rendered "unserved," then

test always trumps any predictive model under the statute. *See NPRM*, par. 30 ("no Commission-endorsed model will preclude a party from using actual measurements at individual households").

The problem is that while there is a logical fit between the Grade B standard Congress chose and the result of a small percentage of households being deemed "unserved," there is not a logical fit between the measurement "safety net" of the SHVA and current measurement techniques. As the *NPRM* points out, current rules require that measurements be taken with a 30-foot antenna and require a 100-foot mobile run. *NPRM*, par. 38, *citing* 47 C.F.R. Sec. 73.686(b). Obviously, this rule was not designed to measure signal strength at an individual location, but rather measure the signal strength along a measurement radial. It does not lend itself to the SHVA safety net.

This is the type of adjustment that the Commission can easily undertake, and should do so immediately. CGT suggests the following testing standard be adopted:

1) In place of the 30-foot antenna, an antenna be raised to a level within five feet of the upper-most height of the roof in question, but in no case in such a way as to obstruct line of sight to signal being tested;

2) That the 100-foot mobile run be eliminated, and a fixed measurement period consistent with sound engineering policy be adopted;

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more lenient assumptions may be necessary. *See NPRM*, par. 36 ("if we change the number of viewers predicted to receive a local station, we may substantially affect these [localism] policies").

3) That a test antenna be used which is commonly available and affordable, but one that is rated for a rural environment (e.g., not a small "urban" antenna);

4) That the Commission assume that a viewer would invest in a rotor. Any viewer willing to spend the money on a DTH installation should also be assumed to have both the desire and resources to install a rotor so that the antenna can point to the appropriate stations; and

5) That in all other respects, the measurement taking be done consistent with the "good engineering practices" methodology used in establishing whether a television station is entitled to must carry status based on its signal strength.[17] In no instance should a single measurement below the required signal level result in a determination of the household being "unserved". *See NPRM*, par. 39, n. 76 (EchoStar proposal).

These minor changes to the measurement procedures are consistent with the spirit of the SHVA, and will, in fact, provide the best indication of whether an individual household is, in fact, truly "unserved," or whether the DTH subscriber merely wishes to avoid the trouble of putting up an outside antenna to receive the local affiliate.

VIII. "LOCAL-INTO-LOCAL, IF LITERALLY TRUE, IS THE ULTIMATE SOLUTION FOR DTH

Finally, the Commission seeks comment as to whether "local-into-local" can solve the current problem of subscribers being signed up illegally having to be removed. The answer is yes, if it is literally true. The problem is that different people have different meaning for the term "local-into-local." The Commission must make clear what it intends this term to mean. CGT supports the concept of local stations being delivered

into their own local markets – turning DTH into the ultimate wireless cable service. However, "local-into-local" only is consistent with Congress' localism policy if several other issues are resolved.

First, it must involve all stations. Merely taking the top 20 or 50 market stations and delivering them is not enough. No network affiliate, no matter how small the market, should be subject to competition from a distant network signal. Second, "local-into-local" must mean "***only*** local-into-local." In other words, a DTH operator must still protect the exclusivity rights of the local affiliate. If WKJG can be uplinked and then brought down into the Ft. Wayne market, it must be the only NBC affiliate available in that market. The DTH operator must not be allowed to also offer WNBC or a West Coast NBC station, just because some subscribers might find the time-shifting aspects of multiple network feeds convenient.

Finally, if DTH truly wishes to turn itself into a wireless cable system, then all of the other cable rules should become applicable, such as must carry, retransmission consent, and Syndex. In exchange for this, DTH should be granted the same compulsory license available to cable systems under Section 111 of the Copyright Act.

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[17] *See Complaint of Independent Public Media of Philadelphia, Inc.*, 8 FCC Rcd 6319 (1993)(minimum of four readings made over two hour test, maximum of 24 hours of testing with measurements taken no more than four hours apart).

IX. CONCLUSION

The conduct of the DTH industry with respect to the SHVA has been outrageous. It has flaunted the law, and now attempts to flaunt the intent of Congress by proposing a redefinition of "unserved areas" which would free it to continue its illegal activities. The Commission cannot condone such activities.

What the Commission can do, however, is eliminate some of the uncertainty in the statute by applying the more sophisticated methodology of Longley-Rice to better predict a station's Grade B contour, and simplify and make more applicable testing standards.

WHEREFORE, the above-premises considered, CGT Corporation respectfully requests that the Commission deny the Petitions filed by NRTC and EchoStar, and adopt the minor changes proposed herein to better effectuate the purposes of the Satellite Home Viewer Act.

Respectfully submitted,

CORPORATION FOR GENERAL TRADE

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December 11, 1998